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Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File:

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 15 2003

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an organization incorporated in March of 1999 in California. It is engaged in the sale and distribution of bathroom and kitchen fixtures. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity. The director also concluded that the petitioner had not established a qualifying relationship with the beneficiary's previous overseas employer.

On appeal, the petitioner asserts that the Service's decision was unfounded and arbitrary and was not in keeping with recent case law and Administrative Appeals decisions.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act

as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The first issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is noted that the petitioner states that the beneficiary is an executive who manages all aspects of the petitioner's operations. It is not clear whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. A beneficiary may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. A petitioner must establish that the beneficiary is acting primarily in an executive capacity and/or in a managerial capacity by providing evidence that the beneficiary's duties comprise duties of each of the four elements of the statutory definitions. Counsel on appeal apparently limits the beneficiary's position to a position that is primarily managerial in nature.

In a letter signed by the petitioner's parent company the beneficiary's duties for the United States petitioner were described as follows:

[The beneficiary] manages, and will continue to manage, all aspects of [the petitioner's] operations. He enters into contracts and negotiations on behalf of company. He maintains control over operations, budgeting, marketing, and sales departments. Functioning autonomously, [the beneficiary] is responsible for managing and directing all of [the petitioner's] business operations.

In the area of human resources management, [the beneficiary] exercises authority in regard to hiring, firing and training of staff as well as delegation of assignments in accordance with staff and capabilities. He is also in charge of promotions, remuneration and performance reviews.

The director requested additional documentation to establish that the beneficiary would be employed in an executive or managerial position in the United States. The director specifically requested the petitioner's organizational chart, its California Form DE-6, Quarterly Wage Reports for 1999 and 2000, a more detailed description of the beneficiary's duties, and a brief description of the duties of all employees under the beneficiary's

supervision.

In response, the petitioner through its counsel stated that the beneficiary as president and chief executive officer would be responsible for a variety of top management tasks including the following:

- Running of day-to-day operations of Los Angeles location
- Supervision of staff members
- Supervising of finance, accounting, marketing, sales, human resources departments
- Negotiating contracts on behalf of the company
- Setting company policies and goals
- Ensuring company departments set budgets and remain within their budgets
- Hiring of staff
- Review staff performances and salary
- Termination of staff
- Setting company direction for future

The petitioner also provided its organizational chart depicting the beneficiary as the president and chief executive officer, a marketing and sales manager, an information technology coordinator, a purchasing and inventory coordinator, and a showroom sales employee. The petitioner also provided the California DE-6 Form for the pertinent quarter ending December 31, 2000. The DE-6 Form reflected three employees and did not include the beneficiary. The positions of the three employees reflected on the DE-6 Form corresponded to the positions of marketing and sales manager, purchasing and inventory coordinator, and the showroom sales employee depicted on the petitioner's organizational chart.

The director determined from the record that the beneficiary was supervising three non-professional employees. The director noted that although the petitioner referred to the employees as managers, the record did not reflect that they were managing other employees and did not describe a function that the employees managed. The director also stated that based on the record, it was unreasonable to believe that the beneficiary would not be involved with the day-to-day non-supervisory duties of operating the business. The director concluded that the petitioner had not established that the beneficiary's duties had been or would be primarily managerial or executive in nature.

On appeal, counsel for the petitioner asserts that the beneficiary manages the organization and points to the past approval and extension of an L-1A non-immigrant visa classification to support this claim. Counsel also submits letters from customers and its bank to support this claim. Counsel asserts that the sales and marketing manager functions in a supervisory capacity and thus meets the requirements of a manager and thus the beneficiary

supervises other managerial or supervisory personnel. Counsel also states that the company is growing and cites an unpublished decision relating to an approval of an L-1A visa classification to support the claim that the Administrative Appeals Office should also consider this factor. Counsel further asserts that the beneficiary exercises discretion over operations as the individual who negotiates contracts, binds the company, sets company policies, and hires and terminates staff. Counsel asserts that the beneficiary manages the function of sales and marketing and that the sales and marketing manager performs this function. Counsel again cites unpublished decisions to support this assertion.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner initially stated that the beneficiary "manages, and will continue to manage, all aspects of [the petitioner's] operations," and "is responsible for managing and directing all of [the petitioner's] business operations." In addition, the petitioner stated that the beneficiary "exercises authority in regard to hiring, firing and training of staff." These statements merely paraphrase elements of the managerial and executive position definition found in the Act. See Section 101(a)(44)(A)(i), (iii) and 101(a)(44)(B)(i). Paraphrasing elements of the managerial or executive definitions does not convey an understanding of the beneficiary's actual day-to-day duties. The initial position description also indicates that the beneficiary "enters into contracts and negotiations on behalf of company," and "delegat[es] assignments in accordance with staff and capabilities," as well as being "in charge of promotions, remuneration and performance reviews." The fact that the beneficiary is the sole employee that negotiates and enters into contracts on behalf of the company is more indicative of an individual acting as the company's agent by providing this basic service. The Service cannot determine from the record whether the beneficiary is performing managerial or executive tasks with respect to this activity or whether the beneficiary is actually performing the activity. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The information provided by the petitioner regarding the beneficiary's supervisory duties does not provide sufficient information to conclude that the beneficiary is anything more than a first-line supervisor.

The petitioner's response to the request for evidence simply rephrases the previous description and adds that the beneficiary is also responsible for "[s]etting company policies and goals," and "[s]upervising [the] finance, accounting, marketing, sales, human resources departments." Again the petitioner paraphrases an element of the executive definition found in the Act (section

101(a)(44)(B)(ii)) and provides insufficient information regarding the petitioner's supervisory duties. Moreover, the description of the beneficiary's supervision of various departments does not correspond to the petitioner's organizational chart and California DE-6 Forms. The organizational chart depicts a marketing and sales manager, an information technology coordinator, a purchasing and inventory coordinator, and a showroom sales person. The California DE-6 Form for the pertinent time period reveals only the marketing and sales manager, the purchasing and inventory coordinator, and the showroom sales employee. There are no employees in the finance, budget, and human resources departments nor are these departments listed on the organizational chart. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988). The petitioner's description of the beneficiary's duties provides only a general overview of the beneficiary's supervisory duties and even that presents a confusing catalog of the beneficiary's actual supervisory duties.

Counsel's assertion that the beneficiary supervises other managerial or supervisory personnel and manages the sales and marketing function is not supported in the record. The assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I&N Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner has not provided a definitive description of the duties of the sales and marketing manager. The organizational chart alone does not establish that the sales and marketing manager's duties are primarily the supervision or management of lower level employees. Rather, the description of the beneficiary's duties appears to restrict the supervision and management of the petitioner's employees to the beneficiary. Further, as the record does not clearly set forth the duties of the sales and marketing manager, the Service cannot conclude that the sales and marketing manager performs an essential function of the petitioner leaving the beneficiary to primarily manage the function.

Counsel's assertion that the Service should consider the previous approvals of the beneficiary's non-immigrant L-1A classification is not persuasive. The director's decision does not indicate whether he reviewed the prior approvals of the other non-immigrant petitions. The record of proceeding does not contain copies of the visa petitions that the petitioner claims were previously approved. However, if the previous non-immigrant petitions were approved based on the same unsupported and confusing information that is contained in the current record, the approval would constitute clear and gross error on the part of the Service. The

Service is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals which may have been erroneous. See, e.g. Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that the Service or any agency must treat acknowledged errors as binding precedent. Sussex Engg. Ltd. v. Montgomery, 825 F.2d 1084, 1090 (6th Cir. 1987); cert denied 485 U.S. 1008 (1988).

Counsel's citation of an unpublished decision in support of a claim that the Service should also consider the growth of the company is also not persuasive. First, the case cited is for the approval of a non-immigrant classification and in the case of eligibility for this immigrant classification a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm. 1971). Second, counsel has not furnished evidence to establish that the facts of the instant petition are otherwise analogous to the facts of the unpublished decision. Third, unpublished decisions are not binding in the administration of the Act. See 8 C.F.R. 103.3(c).

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity or that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The descriptions of the beneficiary's job duties are general and fail to describe the actual day-to-day duties of the beneficiary. In addition, a portion of the position description serves to merely paraphrase the statutory definition of managerial or executive capacity. The small amount of information that actually describes the beneficiary's duties is more indicative of an individual primarily performing the necessary operational tasks of the petitioner. The description of the duties to be performed by the beneficiary does not demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The second issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the parent company.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity.

The petitioner has provided its share certificates, Internal Revenue Service (IRS) Tax Forms 1120, U.S. Corporation Income Tax Return, and a letter from its certified public accountant. The evidence provided all reflect that the beneficiary's overseas employer owns 100 percent of the petitioner.

The director's decision will be withdrawn as it relates to the question of a qualifying relationship between the petitioner and the overseas entity.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.